Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1976

No. 76- 76-6891

WILLIAM CHADBOURNE MITCHELL,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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William Chadbourne Mitchell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction of 21 U.S.C. §841(a)(1).

Opinions Below

The opinion of the court of appeals sitting *en banc* and the dissenting opinion (App. A, 1a-12a)[1] are reported at 538 F.2d 1230. The prior opinion of a panel of the court of appeals (App. B, 13a-23a), which had reversed the conviction, is reported at 525 F.2d 1275. The district court's findings of fact and conclusions of law (App. D, 28a-30a) and its judgment of guilt (App. E, 26a-27a) are not reported.

Jurisdiction

The judgment of the court of appeals (App. C, 24a-25a)

1. References herein to "a" are to pages in the appendix portion of the petition, *infra.*

was entered on September 20, 1976. On September 28, 1976, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Questions Presented

1. Whether federal agents were required to obtain a warrant to search or seize a parked camper-truck when, having probable cause, they planned days in advance to search the vehicle at the very location and on the very day upon which the search occurred, and where the failure to obtain a warrant in advance was not only intentional, but, in the words of the court of appeals *en banc* majority, "foolhardy and unnecessary"?

2. Whether federal agents were required to obtain a warrant to search or seize an off-street parked camper-truck following the arrest of the defendant where there were over a dozen agents already on the scene and there was no reasonable possibility that anyone would attempt or be able to move or meddle with the vehicle during the time required to obtain a warrant?

Statement

1. In June, 1973 agents of the United States Drug Enforcement Agency (DEA) in New Jersey were contacted by a New Jersey resident named Mancuso. Mancuso told the agents of a complicated series of transactions in the spring of 1973 in which he had been hired anonymously by people purporting to represent the Green Transportation Company to drive vehicles from Mexico to the United States (App. B, 15a). Mancuso related that he was provided air travel to Mexico on two occasions, and that on the second trip he drove a green pick-up truck and camper bearing Vermont license plates from Mexico to the Holiday Inn Northeast in San Antonio. Upon returning to New Jersey, he was contacted and directed to go to the West End Bar in New York City and to wear a red wig. There, upon returning from the lavatory, Mancuso found an envelope addressed to him containing a $5,000 "bonus" (App. A, 4a).

After a lengthy investigation, DEA established that the transportation company with which Mancuso had dealt was a "cover" (A. 87, S.A. 8);[2] that the notarization and authorization for Mancuso to drive the truck were invalid, as was the truck's registration (S.A. 9,11,22); and that the pay telephones from which Mancuso had been contacted previously were used in a scheme to import cocaine into the United States (S.A. 59-60). The DEA agents were convinced that Mancuso had been used in a scheme to import illegal drugs into the United States (App. B, 16a).

In October 1973, Mancuso informed DEA that he once again had been contacted surreptitiously by the same "cover" company to drive the same pick-up truck over the identical route to the Holiday Inn in San Antonio to which he had taken it on the earlier trip (*id.*). DEA agents immediately began elaborate plans to prevent, with Mancuso's assistance, the suspected importation of contraband and to apprehend the person or persons who were responsible.

Mancuso informed DEA of his instructions to drive the truck over the Mexican border on October 13, 1973. On October 12, Special Agent Kline, who was in charge of the entire DEA operation, conducted a briefing at which plans for the anticipated surveillance, arrest and seizure were discussed (*id.*).

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2. References to "A." and to "S.A." are to pages in the Appendix and Supplemental Appendix filed with the court of appeals, copies of which will be lodged with the Court upon request.

This trip aborted when Mancuso was informed that evening that the truck was not ready and that he should return to New Jersey.

Mancuso later was instructed to return to Mexico on October 20 to drive the truck on the planned route to San Antonio on October 21. He relayed the information to the DEA agents. Kline held another briefing with DEA and customs agents[3] on October 19, at which he repeated the plans for surveillance, arrest, and seizure and restated his belief that narcotics would be on the truck (S.A. 16, 68).

On October 21, Mancuso drove the truck across the border according to plan and proceeded on the appointed route to the San Antonio Holiday Inn. Federal agents, utilizing five automobiles and an airplane, kept the truck under constant surveillance (App. B, 17a; S.A. 29, 34-36, 70-71). Meanwhile a DEA "stake-out" unit had been established at the Holiday Inn in San Antonio. The DEA agents at the motel set up in advance a videotape surveillance unit, and a special "starlight scope" for taping by moonlight (App. B, 17a).

Mancuso arrived at the Holiday Inn and, as instructed by his employer, locked the vehicle, disposed of the keys, and departed the scene (App. A, 5a). Shortly thereafter Mitchell, who had been observed following Mancuso all the way from Mexico, arrived in a rented automobile (*id.*). By this time there were between twelve and fifteen federal agents on the scene (S.A. 55). Mitchell transferred some personal items from the car to the truck, and then left in the car. He returned about a half-hour later in a taxicab. When he attempted to enter the truck-camper, he was arrested (App. A, 5a). Mitchell was led away from the parking lot, but was brought back several minutes later to be present during the search (S.A. 116-118).

An initial search of the truck did not yield contraband. Dogs were brought in and their behavior suggested that drugs were secreted between the truck and the camper. With considerable effort, the agents were able to pry the camper up enough to discover a sample of what appeared to be marijuana. Subsequently, at police headquarters, 400 pounds of marijuana were removed (App. A, p. 6a).

3. Kline later testified that he requested the assistance of customs agents in the belief that their presence would justify the failure to obtain a warrant (S.A. 61, 63).

The federal agents never attempted to obtain a search warrant for these actions (*id.*), despite the fact that it was their admitted intention to arrest whomever arrived to claim the truck at the Holiday Inn and to search the truck at that time (S.A.52).

2. A two count indictment was returned against petitioner on April 11, 1974. Count One alleged a conspiracy to import and to possess with intention to distribute a commercial quantity of marijuana, in violation of 21 U.S.C. §§963 and 864. Count Two alleged that petitioner possessed with intent to distribute approximately 400 pounds of marijuana, in violation of 21 U.S.C. §841(a)(1).

Prior to trial petitioner moved to suppress the marijuana and other evidence seized from the truck-camper. After a hearing, the district court orally denied the motion to suppress, stating that there was probable cause to search and that no warrant was required under the "automobile search" doctrine (A. 15).

The marijuana was introduced at the non-jury trial. The court found petitioner guilty of both counts of the indictment. Subsequently, the court granted the government's post-trial motion to dismiss the first count of the indictment (A. 165), and entered a finding of guilty on Count Two (A. 168 - A. 170). The court sentenced petitioner to a term of five years imprisonment with a five year special parole term (App. D, 27a).

3. A unanimous panel of the court of appeals reversed the conviction. It held that while the government had probable cause to search the vehicle, there were no exigent circumstances to justify the failure to obtain a warrant prior to the confrontation at the Holiday Inn. "Probable cause to suspect contraband was present" (20a) existed long before the vehicle arrived in San Antonio. Moreover, the government "knew when and where the car [sic] was to arrive" and planned on seizing and searching it

at that time and place (*id.*). It was "a *planned* warrantless seizure . . . without any unforeseeable or actually unforeseen circumstances" (*id.*).

The court of appeals panel also rejected the government's effort to justify the search as a "border search," holding that under all the circumstances of the case, the planned warrantless seizure of the vehicle 300 miles within the United States and seven hours after its entry did not come within that narrow exception (*id.* at 22a-23a).

4. Upon rehearing *en banc*, the court of appeals, over four dissents,[4] overruled the panel, upheld the warrantless search as justified by exigent circumstances, and affirmed the conviction.

The court of appeals began its analysis by acknowledging that the agents' failure to obtain a warrant prior to the expected arrest and seizure at the Holiday Inn in San Antonio was "foolhardy and unnecessary" (7a). Expressing its "dismay" (*id.*) at the agents' actions in "precipitat[ing] all concerned into so vexed and parlous an area of constitutional law," the court found that "a trip to the magistrate by one of the many agents would have rendered all secure" (9a).

Nevertheless, the court of appeals found that exigent circumstances arose when someone (i.e., Mitchell) appeared to claim the truck-camper and to drive it away. The fact that Mitchell's action was entirely anticipated by the agents did not matter to the court. It held that the potential for mobility which arose at that time excused the prior decision not to obtain a warrant.

The court of appeals also summarily rejected appellant's argument that after his arrest, there were no exigent circumstances to justify the search *or* seizure of the vehicle prior to obtaining a warrant, ruling that the argument is foreclosed by *Chambers* v. *Maroney*, 399 U.S. 42 (7a-8a).

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4. Judges Wisdom and Thornberry did not participate because of illness.

Reasons for Granting the Writ

1. The court of appeals' holding that a warrantless seizure and search of a vehicle may be justified by *anticipated* "exigent" circumstances when the date and location of the seizure were known in advance and where probable cause existed well before the seizure critically distorts the "limited [exigency] exception," *Coolidge* v. *New Hampshire*, 403 U.S. 443, 479, to the warrant requirement. It is contrary to every pronouncement on the subject by this Court and by the other federal courts of appeals. Unless corrected it will exacerbate the confusion which already reigns in the application of the Fourth Amendment to vehicle searches and seizures, and which, even before the instant decision, has compelled several circuit courts of appeals to call for clarification from this Court. Finally, the court of appeals' decision will have serious ramifications well beyond vehicle searches, *per se;* it will encourage "mistakenly overzealous [law enforcement] officers," *Gouled* v. *United States*, 255 U.S. 298, 304, to create their own "exigent" circumstances rather than fulfill their obligation under the Fourth Amendment to obtain a warrant.

(a) The court of appeals' effort to identify exigent circumstances in the present case is contrary to common sense and logic, as is demonstrated by its own awkward effort to reconcile its holding with its criticism of the actions of the DEA agents. The court recognized that the agents "*chose* to forego" (9a) a trip to the magistrate, not because it was impractical or because they did not foresee the precise time and place of their planned search, but because they "gamble[d] that factors of exigency excusing that trip" (9a) would arise.[5] It admonished the agents for failing to consider that "any number of unforeseeable events" (9a) could have arisen which would have interfered with the so-called "exigency" which they anticipated. But the court upheld the warrantless search because nothing unforeseeable in fact did occur and the expected "exigency" in fact did arise.

The court of appeals' analysis turns the exigent circum-

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5. The expected "exigency" was that someone would appear and attempt to drive away with the vehicle.

stances rationale on its head. Where every aspect of a search and seizure is anticipated, where the failure to obtain a warrant in advance is "foolish and unnecessary," where no event occurs to upset the federal agents' scenario, by definition there is no exigency.

In defining the exigent circumstances which give rise to the limited automobile search exception, this Court consistently has emphasized the unforeseeability of events which require an immediate search or seizure. Thus in *Carroll* v. *United States,* 267 U.S. 132, the Court noted that the federal agents *"were not anticipating* that the defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor, and hence the search, seizure, and arrest." *Id.* at 136 (emphasis added). The Court upheld the agents' action because, under the unforeseen circumstances, it would not have been "practicable to obtain a warrant." *Id.* at 153. In *Chambers* v. *Maroney,* 399 U.S. 42, the Court warned that it was not dispensing with the warrant requirement in all automobile search cases. Only where "the circumstances that furnish probable cause . . . are . . . *unforeseeable,*" and "the opportunity to search is *fleeting* . . . ," *Id.* at 50-51 (emphasis added), may a warrantless search be conducted upon probable cause. Finally, in *Coolidge* v. *New Hampshire,* 403 U.S. 443, the Court refused to uphold the warrantless search and seizure of an automobile:

> Since the police knew of the presence of the automobile and planned all along to seize it, there was no "exigent circumstance" to justify their failure to obtain a warrant.

Id. at 484.[6]

By permitting federal agents to anticipate a so-called exigency – in fact, to create it – and then to exploit its occurrence as an excuse for an intentional previous decision not to obtain a warrant, the court of appeals "enthrones" the exception "into

6. The quoted portion is from Part IID of the *Coolidge* opinion, in which Mr. Justice Harlan joined.

the rule." *United States v. Rabinowitz,* 339 U.S. 56, 80 (Frankfurter, J., dissenting). Its decision would allow officers to avoid the warrant requirement in almost every conceivable instance, whether the search is of an automobile, an office, or a home. Instead of applying for a warrant, a police officer could wait for or create a context which would justify immediate intervention to prevent flight, destruction of evidence, possible injury, etc.[7] This is the most radical departure from the warrant requirement ever suggested by a court of appeals, and one never countenanced by this Court.

b. The court of appeals attempted to draw support for its analysis from a passage from the opinion of Mr. Justice Blackmun in *Cardwell* v. *Lewis,* 417 U.S. 583 at 595-596:

> Respondent contends that here, unlike *Chambers,* probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practical moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of the arrest. Cf. *Chambers, id.,* 399 U.S. at 50-51. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

We note initially that there was no opinion of the Court in *Cardwell,* and that the Justices who addressed themselves to the

7. For example, under the court of appeals' analysis, a DEA agent with probable cause could knock on a person's door, state that the individual is suspected of narcotics possession, and request permission to search. If permission were refused, a search could be conducted anyway, because of the "exigent" circumstance that the alerted suspect would destroy the contraband.

issue relevant here were divided 4–4. Thus the broad and expansive interpretation given to Mr. Justice Blackmun's opinion by the court of appeals is particularly unwarranted. Indeed, if the court of appeals' reading of Mr. Justice Blackmun's opinion is accurate, then *certiorari* should be granted so that the Court may resolve its own differences on the question.

Petitioner submits, however, that the court of appeals totally misread the quoted dictum from Mr. Justice Blackmun's opinion. Properly read, it stands for the obvious proposition that law enforcement agents need not decide, at the precise moment when probable cause first arises, whether or not or under what circumstances they will attempt a search or seizure. Accordingly, they need not interrupt an ongoing investigation to secure a warrant at that moment. It is sufficient if the law enforcement agents delay getting a warrant until a decision is made to conduct a seizure and search at a particular time and place. If, in the interval between the time that probable cause first arises and a decision to seize and search is made, an unanticipated exigency arises requiring immediate intervention, then the agents may seize and search without a warrant.

In *Cardwell,* for example, even after probable cause arose the police had made no firm decision to search or seize the vehicle; certainly no decision had been made to do so at a particular time and place. Indeed, the vehicle's owner seemingly was cooperating with the police and it was conceivable that a search or seizure would not be necessary. When it became obvious to the police that a seizure was required, exigent circumstances had arisen.[8] The case is quite different from the present case in which the federal agents not only had probable cause to seize the vehicle well before the actual arrest and seizure, but planned long in advance to do so on a particular day, at a particular place, and under well-anticipated circumstances. No opinion in *Cardwell* purports to sanction a warrantless search in such a context.

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8. The dissenting Justices in *Cardwell* did not agree that there were exigent circumstances.

Several courts of appeals have made the very distinction made here between the *Cardwell*-type situation and that present in the instant case.

In *United States* v. *Frazier,* 538 F.2d 1322 (1975), the Eighth Circuit upheld a warrantless vehicular search, despite the possible earlier existence of probable cause, explicitly on the grounds that it was necessary for the agents to conduct further investigation before a search to determine accomplices, followed by the sudden and unanticipated need to conduct an immediate search to protect the life of an unknown individual.

In *United States* v. *Vento,* 533 F.2d 838 (1976), the Third Circuit rejected the defendant's argument that a warrant should have been obtained when probable cause first arose, on the grounds that the agents had not yet determined precisely when, where, or under what circumstances they would search: "The need to search DeLuca's car arose suddenly and it was not possible for the DEA agents to obtain a warrant for the search of the car prior to DeLuca's arrest." *Id.* at 867.

In *United States* v. *Farnkoff,* 535 F.2d 661 (1976), the First Circuit noted with approval the panel's decision in the present case, but upheld the warrantless search of an automobile even though probable cause existed sufficiently in advance to obtain a warrant. The distinguishing factor was that in *Farnkoff,* unlike in *Mitchell,* "there [was] no indication that the agents knew when they obtained the warrant for the building that they would later want to search the car as well." *Id.* at 666. The First Circuit followed a similar approach in *United States* v. *Ferrara,* 539 F.2d 799 (1976), in upholding a warrantless search where the agents in good faith were endeavoring to obtain additional evidence to present to a magistrate when exigent circumstances arose requiring an immediate search. The court distinguished the case from its own decision, which it reaffirmed, in *United States* v. *Niro,* 388 F.2d 535 (1968), in which it held:

> Proceeding without a warrant is not to be justified, as the government suggests here, by the fact that by the time the officers act, dispatch is necessary to avoid

> flight or injury to person or property. Haste does not become necessary in the present sense if the need for it has been brought about by deliberate and unreasonable delay. This would allow the exception to swallow the principle.

388 F.2d at 540.

By choosing to interpret the language of Mr. Justice Blackmun's *Cardwell* opinion as justifying the planned warrantless search here, the Fifth Circuit has created a rule which has not been applied elsewhere and which is totally inconsistent with the decisions of other circuit courts and with the previous pronouncements of this Court.

c. While the several courts of appeals (other than the Fifth Circuit) agree that nothing in *Cardwell* justifies a warrantless search in the circumstances which existed in the present case, they have noted the general difficulty of reconciling some of the language in *Cardwell* with previous vehicle search doctrine as enunciated in *Carroll, Coolidge* and *Chambers.* Especially in light of the fact that there was no opinion of the Court in *Cardwell,* and that all Justices in *Cardwell* specifically abjured an intention to disturb *Carroll* or *Coolidge,* 417 U.S. at 592 n. 8, 593, these courts of appeals have pleaded that the Court provide further clarification and guidance.

Thus in *Farnkoff, supra,* the First Circuit noted that the Court's observation in *Coolidge* that the automobile search cases "over the years point in differing directions" is even more true today in light of *Coolidge, Cardwell,* and *Texas* v. *White,* 423 U.S. 67. In *United States* v. *Robinson,* 533 F.2d 578 (1976), the District of Columbia Circuit, sitting *en banc,* wrote of the "needed reconciliation" of the "divergent plurality opinions" of *Coolidge* and *Cardwell.* See also *United States* v. *McClain,* 531 F.2d 431 (9th Cir. 1976); *United States* v. *Bradshaw,* 490 F.2d 1097 (4th Cir. 1974).

Certiorari should be granted to resolve these questions. While, as we have suggested (*supra* at 10), a reconciliation can be effected among *Cardwell, Coolidge, Carroll* and *Chambers,*

such a reconciliation requires reversal of the decision below. The court of appeals made no effort to analyze and apply the various cases, and its decision in effect ignores a half-century of doctrine in this Court and in the lower federal courts. If its decision is not reviewed, the reigning confusion and conflict in the area of vehicular searches will degenerate into chaos. This Court must restore order, logic and justice to the constitutional scheme of the Fourth Amendment.

2. The court of appeals also rejected petitioner's alternative argument that, even if the federal agents were not required to obtain a warrant prior to the anticipated confrontation at the Holiday Inn, subsequent to Mitchell's arrest the federal agents neither should have searched nor seized the parked vehicle without obtaining a warrant. The issue raised – *i.e.,* whether and under circumstances law enforcement agents may conduct a warrantless search or seizure of a parked vehicle – is similar to that which sharply divided this Court in a different factual context in *Cardwell* v. *Lewis, supra,* and for which no definitive resolution was reached. There has been considerable disagreement and confusion in the courts of appeals as to the effect and scope of *Cardwell* upon searches or seizures of parked vehicles. The opinion of the court of appeals in this case goes the furthest toward eliminating the warrant requirement altogether, and is in direct conflict with the approach and holdings of several other circuit courts. See *United States* v. *Bradshaw,* 490 F.2d 1097 (4th Cir. 1974); *United States* v. *Robinson,* 533 F.2d 578 (D.C. Cir. 1976) (*en banc*).

The court of appeals claimed reliance upon the holding of *Chambers* v. *Maroney, supra,* that there is no constitutional difference between searching a mobile automobile at the scene, on the one hand, and seizing it and searching it at the police station, on the other. The court ignored the crucial fact that, in the context of the present case, there was no need to search *or* seize the vehicle at the Holiday Inn following Mitchell's arrest, without first obtaining a warrant. The vehicle was parked off the street in a semi-private parking lot. Because of the extended nature of the surveillance leading up to the arrest, there were over a dozen federal agents on the scene to provide a protective overwatch of

the vehicle while an application for a warrant was made. The DEA agent in charge testified that he had no reason to believe that there was any danger that confederates or accomplices would arrive to drive away with the vehicle or destroy contraband (S.A. 55).

The situation thus was radically different from that in *Chambers* or *Texas* v. *White,* 423 U.S. 67, in both of which the automobile was stopped on the road, probable cause arose unexpectedly, and it would have been very inconvenient or impossible to post an effective guard. The context was very different even from *Cardwell,* in which the police officers had reason to believe that the suspect's wife or attorney would attempt to drive off with the automobile. 417 U.S. at 595. Nothing in any of those decisions contradicts the core principle expressed in *Coolidge,* that where it is practical to obtain a warrant prior to a search *or* seizure of a vehicle and no event transpires requiring immediate intervention, then a warrant is required.

The District of Columbia Circuit, sitting *en banc,* recently reviewed this Court's decisions, including *Cardwell* and *White,* and came to the conclusion that it would not uphold a warrantless search of a parked unoccupied car in circumstances similar to those present here. *United States* v. *Robinson, supra.*[9] The court noted the "divergence" between this Court's plurality opinions in *Coolidge* and *Cardwell,* but assumed that "if a Supreme Court majority intends . . . to depart from its prior approach, it will do so by express pronouncement to all concerned." 533 F.2d at 538 n. 9. The Fourth Circuit's decision in *United States* v. *Bradshaw, supra,* overturned a conviction expressly on the grounds that a warrant could have been obtained prior to the search or seizure of the parked vehicle. Both courts noted the unsettled nature of the problem. See also *United States* v. *McClain,* 531 F.2d 431 (9th Cir. 1976).

The Fifth Circuit's decision below is plainly contrary to the approach and holdings of its sister circuits. If a warrant was not required prior to the search or seizure of the vehicle here, it is difficult to imagine under what circumstances a warrant ever would be required for a vehicular search. The Court should grant certiorari to resolve the differences among the circuits as to the meaning and scope of the Court's various pronouncements on the issue, and to reaffirm that law enforcement officers must comply with the warrant requirement unless it is not reasonably practicable to do so, even when they seek to search or seize an automobile or other vehicle.

9. The court noted with approval the panel's decision in the present case. 533 F.2d at 583 n. 9.

3. The internal inconsistency and tortured analysis in the court of appeals' opinion reveals a result-oriented approach to this case. As Circuit Judge Dyer suggested in dissent, the majority's opinion can be explained only by its apparent reluctance to apply the exclusionary rule where "the constable put himself in the way to blunder" (App. A, 11a). But the exclusionary rule is and has remained the law in the federal courts for over sixty years. See *Weeks* v. *United States,* 232 U.S. 383. Until and unless this Court overrules *Weeks,* the federal courts have the obligation to apply the rule with full force, and without undermining the core protection of the Fourth Amendment itself.

In the instant case, application of the exclusionary rule is particularly appropriate. This is not a case in which law enforcement agents relied upon a warrant which turned out to be insufficient, or where agents in good faith mistakenly believed that they could not obtain a warrant under the circumstances. Rather it is a case in which, as the court of appeals recognized, the federal agents intentionally and purposely decided to forego the warrant procedure. It is precisely such actions against which the exclusionary rule is directed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 1976

Appendix A

Opinion of the Court of Appeals, Upon Rehearing *En Banc*

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Chadbourne MITCHELL,
Defendant-Appellant.

No. 75–1814.

United States Court of Appeals,
Fifth Circuit.

Sept. 20, 1976.

Defendant was convicted before the United States District Court for the Western District of Texas, Adrian A. Spears, Chief Judge, of possessing marijuana with intent to distribute, and he appealed. A panel of the Court of Appeals, 525 F.2d 1275, held that neither exigent circumstances nor "border search" exception obtained with respect to warrantless search of truck and reversed. After reargument en banc, the Court of Appeals, Gee, Circuit Judge, held that where at time of seizure defendant had completed loading truck, disposed of his other vehicle, and assumed driver's seat, ignition key in hand, exigent circumstances existed for warrantless search of truck regardless of fact that federal agents had had ample prior opportunity to obtain warrant.

Affirmed.

Roney, Circuit Judge, concurred in result only.

Dyer, Circuit Judge, filed dissenting opinion in which Goldberg, Godbold and Lewis R. Morgan, Circuit Judges, joined.

1. Searches and Seizures ⇐3.3(7)

Where probable cause existed for search of truck, and at time of seizure in motel parking lot defendant had completed loading truck, disposed of his other vehicle, and assumed driver's seat, ignition key in hand, exigent circumstances existed for warrantless search of truck. U.S.C.A.Const. Amend. 4.

2. Drugs and Narcotics ⇐183

Presence around parking lot in which truck believed to contain marijuana was located of ten or more surveilling agents rather than one or two did not affect question whether truck was immobile so as to preclude finding of exigent circumstances for warrantless search of truck. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A.Const. Amend 4.

3. Searches and Seizures ⇐3.3(7)

Where exigent circumstances arose for warrantless search of truck after defendant completed loading truck, disposed of his other vehicle, and assumed driver's seat, ignition key in hand, fact that federal agents, who chose to forego trip to magistrate and gambled that factors of exigence excusing that trip would

arise, had ample time after probable cause arose to obtain warrant but did not attempt to do so did not invalidate search on theory that search was deliberately planned as a warrantless one. U.S. C.A.Const. Amend. 4.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and GEWIN, THORNBERRY *, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.**

GEE, Circuit Judge:

Mitchell appeals his conviction and five-year sentence for possessing marijuana with intent to distribute, 21 U.S.C. § 841(a)(1). The sole issues on this appeal concern the constitutional validity of a warrantless search of an automobile in which appellant was apprehended and in which the contraband was discovered. A panel of this court, though acknowledging the existence of probable cause to support the search, concluded that neither exigent circumstances nor the "border search" exception obtained and reversed Mitchell's conviction. Believing

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* Because of illness, Judge Thornberry did not participate in the consideration of this case.

** Because of illness, Judge Wisdom did not participate in the hearing or in the consideration of this case.

the views expressed by our panel dubious in light of recent Supreme Court authority, we took the case en banc and heard re-argument. We now vacate the panel's action and affirm the judgment below.

Pertinent Facts

The panel opinion, reported at 5 Cir., 525 F.2d 1275, carefully sets out the facts leading up on the critical search, and we need not repeat these in detail here. Suffice it to say that in the spring of 1973, federal Drug Enforcement Administration officials in New Jersey were contacted by one Mancuso, who established to their satisfaction that he had been hired by an anonymous employer operating in a "cover" name to drive a truck from Mexico into the United States. Mancuso had already completed one such successful expedition, and another was in the offing. His suspicions had been aroused, however, by the unexpected munificence of a cash bonus delivered to him under mysterious circumstances after the first trip—$5,000. Investigation indicated these arrangements were likely a cover for some sort of a contraband-smuggling scheme. After various false starts and minor maneuvers unnecessary to detail, Mancuso advised the officials that he was to pick up the truck (which he accurately described in great detail, including its Vermont license plate) in Mexico on October 20, 1973, cross the border at a given time, and leave it on the parking lot of a

specified motel in San Antonio, Texas. This he did and, as instructed by his employer, locked the vehicle, disposed of the keys, and departed the scene.

Shortly thereafter at about dusk, appellant Mitchell, who had been observed following Mancuso discretely all the way from Mexico, drove his rented automobile into the parking lot. The several agents who were lying in wait there saw him circle the parked truck, return to the public street, and park. About ten minutes later, accompanied by his dog, he re-entered the lot and parked alongside the truck. Producing a key, Mitchell then unlocked the rear door of the truck's camper body, as well as the truck's cab. He then locked the dog in the cab and transferred the contents of his automobile to the truck's camper enclosure. Among these were several angle-irons and two hydraulic jacks, suitable for elevating the camper shell from the truck bed. These maneuvers were videotaped by the agents, in part by the use of special "starlight" lens equipment provided by them in anticipation of night work. His transfers completed, Mitchell locked the truck throughout and drove off in his automobile. At this time, about an hour had elapsed from his first appearance at the parking lot that Sunday evening.

About half an hour later, having turned in his rented car as was later ascertained, he returned in a taxi. When he re-entered the truck cab, seated himself, and "it appeared imminent

that he was going to drive the truck away," agents converged on the truck and arrested him. About a forty-five minute wait then ensued while Customs' dogs trained to sense controlled substances were summoned. When their actions indicated the presence of such substances in or about the camper, the agents attempted to gain access to the area between the camper floor and the truck bed. After about a half-hour's effort and the removal of a hold-down bolt, they were able to pry up the camper and obtain a small sample of vegetable material which they recognized as marijuana. The camper shell was later removed by means of the jacks, and quantity of over 400 pounds of the substance was found hidden in the space between the camper floor and the truck bed. The agents neither had nor ever attempted to get a warrant authorizing any of these actions.

Probable Cause: Exigent Circumstances?

In view of the above facts and others detailed in the thorough opinion of our panel, appellant wisely concedes the existence of probable cause to support the search.[1] He argues, however, that for two reasons there were not exigent circumstances justifying the agents' failure

1. Indeed, his major argument, shortly to be dealt with, is that probable cause arose sufficiently early that the agents' failure to obtain a warrant based on it makes their actions a "planned warrantless search."

to obtain a warrant. We can only confess our congeniality to appellant's objection and our perhaps ingenuous dismay that at no time in the course of these experienced agents' elaborate and lengthy preparations to apprehend him did it appear to cross anyone's mind to seek a warrant. Clearly this would have been the better course; it does not follow necessarily, however, that the chosen one was fatal and that the guilty Mitchell must therefore go free. That it was foolhardy and unnecessary, however, is too plain for argument.

Was the Truck Immobile?

[1, 2] Appellant's first contention, that by the time of the search the truck had been immobilized, exigence had passed, and a warrant could have been obtained at leisure, is foreclosed by *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), and *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). Both of these authorities recognize that exigence is to be determined as of the time of seizure of an automobile, not as of the time of its search; the fact that in these cases sufficient time to obtain a warrant had passed between each seizure and the corresponding search did not invalidate either. At the time of the seizure here, Mitchell had completed loading the truck, disposed of his other vehicle, and assumed the driver's seat, ignition key in hand.[2] To require the agents to permit

2. Mitchell's condition of mobility may be instructively compared with those of the defend-

him to depart and then run him to ground on the public street would be ludicrous. Nor do we think the matter affected by the presence around the parking lot of ten or more surveilling agents rather than one or two. We have never before tested mobility of automobiles or exigence of circumstances by evaluating police capability to respond or the balance of forces deployed. Once commenced, the end of such a calculus would be evaluation of the opposing armaments and of the relative top speeds of the vehicles. We decline to embark on it.

The "Planned Warrantless Search"

[3] Appellant's major argument for want of exigence, and that chiefly relied on by the panel in invalidating the search, is that the search was deliberately planned as a warrantless one. By this is meant either (or perhaps both) that there was ample time after probable cause had arisen for the obtaining of a warrant but none was sought or that the agents, confident that they would be dealing with an automobile, deliberately chose to take advantage of the so-called

ants in *Cardwell* and in the more recent case of *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975). In *Cardwell*, the car searched was parked on a lot, and the keys and claim check were in the defendant Lewis' pocket at the time of his arrest. In *White*, the defendant had parked the car at the curb under police instructions when he was arrested. As *Cardwell* notes, 417 U.S. at 594, 94 S.Ct. at 2471 (plurality opinion), none of this matters much: "The fact that the car in *Chambers* was

"automobile exception" to the warrant requirement. We have already noted our incredulity that experienced agents would deliberately and needlessly precipitate all concerned into so vexed and parlous an area of constitutional law, a decision roughly comparable in prudence to determining whether an electric wire is charged by grasping it. In the first place, as the panel opinion correctly notes, there *is* no general automobile exception to Fourth Amendment requirements. In the second, and as a practical matter, any number of unforeseeable events could have frustrated the agents' reliance on the narrower exception which does in fact exist. A trip to the magistrate by one of the many agents would have rendered all secure. Instead, the agents chose to forego it and gamble that factors of exigence excusing that trip would arise.

As we have noted above, they did arise. And since they did, it does not matter *when* they did. As the Supreme Court noted in *Cardwell:*

> *Respondent contends that here, unlike Chambers, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances.* Assuming that probable cause previously existed, we know of no case or principle that

seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance." But if it had, the mobility honors seem to rest with Mitchell, if with anyone among the three of himself, Lewis and White.

suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practical moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of the arrest. Cf. *Chambers*, id., 399 U.S. at 50–51, [90 S.Ct. 1975, at 1980–1981, 26 L.Ed.2d 419]. *The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.* (emphasis added)

417 U.S. at 595–96, 94 S.Ct. at 2472 (plurality opinion). *Cf. United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975).[3]

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3. We note in passing that the reference to *Coolidge v. New Hampshire*, 403 U.S. 443, 472 n. 27, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), cited by the panel opinion in support of its invalidation of the agents' action here as a "*planned* warrantless seizure," 525 F.2d at 1278, is inapposite. The Supreme Court was there speaking to the inadvertence element of the plain-view doctrine, a well-established and integral part of that exception to the warrant requirement. Inadvertence or unforeseeability has never been recognized as an element of the exigent circumstances exception—rather the contrary, as the text references above to *Chambers* and *Cardwell* demonstrate. Moreover, contraband is specifically excluded from the reach of the sentence to which the footnote cited from *Coolidge* is appended.

We deal here with a crime and a criminal, not with a sporting event. True, the constable put himself in the way to blunder, though he did not. Appellant would nevertheless have us disqualify him from the game because he chose a course less than the best, or perhaps because his heart was not entirely pure. But it was not a game, and we decline to do so.[4]

Appellant's conviction is

AFFIRMED.

RONEY, Circuit Judge, concurring in result only.

DYER, Circuit Judge, with whom GOLDBERG, GODBOLD and MORGAN, Circuit Judges, join, dissenting.

With deference I dissent. Nothing said in the majority opinion changes my conviction that the panel opinion applied correct legal principles to the undisputed facts.

I have found no case, *Watson*, *White* and *Cardwell* included,[1] that dispenses

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4. Our disposition makes it unnecessary for us to reach the issue of whether the agents' procedures were valid as a "border search" under *United States v. Martinez*, 481 F.2d 214 (5th Cir. 1973), except insofar as we vacate the panel's treatment of this point.

1. The Supreme Court took pains to point out in *Cardwell* that it was "not confronted with any issue as to the propriety of a search of a car's interior," and emphasized that neither *Carroll* nor *Coolidge* was therefore apposite.

with exigent circumstances for a search of an automobile without a warrant. Other Circuits are in accord. *United States v. Farnkoff,* 1 Cir. 1976, 535 F.2d 661 [19 Cr.L. 2205]; *United States v. McClain,* 9 Cir. 1976, 531 F.2d 431 [18 Cr.L. 2521]; *United States v. Robinson,* D.C.Cir.1976, 533 F.2d 578 [18 Cr.L. 2534, en banc]; *United States v. Kemper,* 6 Cir. 1974, 503 F.2d 327, cert. denied, 1975, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 824; *United States v. Bozada,* 8 Cir. 1973, 473 F.2d 389; *United States v. Bradshaw,* 4 Cir. 1974, 490 F.2d 1097, cert. denied 1974, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139.

This is factually a unique case. From beginning to end the truck's trip varied not one iota from the detail worked out in rehearsal—about which all was known by the agents. Even the closed circuit television cameras were in place to photograph and record the arrest and seizure. The agents knew that someone (Mitchell) would get into the truck at the Holiday Inn and attempt to drive away. At the time of the seizure nothing had occurred or did occur that was unanticipated or unexpected. It is semantic aphasia to define these circumstances as exigent.

I am as much against crime and criminals as the next judge. But this generalization has no place in determining whether the government has failed to prove its case because evidence upon which it relied is inadmissible as having been obtained in an unconstitutional manner. I would reverse the conviction.

Appendix B

Opinion of the Panel of
the Court of Appeals

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**William Chadbourne MITCHELL,
Defendant-Appellant.**

No. 75–1814.

United States Court of Appeals,
Fifth Circuit.

Jan. 16, 1976.

Defendant was convicted in the United States District Court for the Western District of Texas at San Antonio, Adrian A. Spears, Chief Judge, of possessing marijuana with intent to distribute. Defendant appealed. The Court of Appeals, Dyer, Circuit Judge, held that where there was probable cause to suspect contraband in a van and where the entire operation from beginning to end had been intimately surveilled, the Government knowing when and where the van was to arrive, and where it was entirely practicable for the agents to procure a search warrant, search without a warrant and without any exigency factor was violative of the Fourth Amendment. The border search exception to warrant requirement was not applicable.

Reversed.

1. Searches and Seizures ⇐3.3(6)

There is no per se exemption of search warrant requirement for automobiles. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A.Const. Amend. 4; 19 U.S.C.A. § 482.

2. Searches and Seizures ⇐7(10)

Where there was probable cause to suspect contraband in van and entire operation from beginning to end had been intimately surveilled, the Government knowing when and where van was to arrive, and where it was entirely practicable for the agents to procure search warrant, search without warrant and without exigency factor was violative of Fourth Amendment. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(i); U.S.C.A.Const. Amend. 4.

3. Customs Duties ⇐126

Where there was complete, detailed and reliable knowledge of itinerary and destination of vehicle, control of vehicle by cooperating informer and thorough surveillance and general preparedness of the Government at planned search site, which was about 300 miles from border crossing, border search exception to warrant requirement was not applicable. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A.Const. Amend. 4; 19 U.S.C.A. § 482.

Appeal from the United States District Court for the Western District of Texas.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

DYER, Circuit Judge:

Mitchell seeks reversal of his conviction of possessing marijuana with intent to distribute, 21 U.S.C.A. § 841(a)(1). He asserts that his Fourth Amendment rights were violated in the search of a parked pick-up truck which had recently crossed into the United States at the Mexican border and in the seizure of 400 pounds of marijuana. The government argues two bases to justify the government's lack of search warrant: first, the so-called automobile exception for exigent circumstances; and second, that this was a border search. We conclude that the district court erred in denying the appellant's motion to suppress the evidence and reverse.

In June of 1973, agents of the United States Department of Justice's Drug Enforcement Agency (DEA) in New Jersey, were given information by Mancuso, a private individual, concerning a complicated series of transactions in the spring of 1973, in which he had been anonymously hired to drive a car into the United States from Mexico. The cooperating informer presented ample supporting documentation of these initial trips.

DEA agents in New Jersey conferred about these operations with DEA agents in Texas over the course of the summer

of 1973. During this period DEA discovered substantial evidence indicating that the apparent travel arrangements were merely a cover for an illegal scheme to import contraband narcotics. In October of 1973, Mancuso was once again surreptitiously propositioned about this Mexican venture in New York City by a phony transportation company. Mancuso told DEA about his instructions to fly to Texas, to cross the border to Mexico, to pick up the same pick-up truck he had driven across empty in April and deliver it to the same San Antonio Holiday Inn he had taken it to on the earlier trip.

On October 13th, a meeting was held by the agents of the Texas DEA with New Jersey DEA and the United States Customs. The DEA agents discussed their belief that narcotics were going to be smuggled into the country in this truck. This trip, like the April one, aborted when Mancuso the next day was told by telephone that the truck was not yet ready, and to return to Mexico and pick up the truck on October 20. He supplied DEA with the truck's description (color, make, license plates, etc.), its designated destination and the time of border crossing. These specifics were the same as they had been in the prior runs in the spring.

On the day of the contested search, the DEA had made extensive preparations for the contemplated drug seizure, both at the border and at the designated arrival site of the truck in Texas. The truck driven by Mancuso, and a red Buick automobile driven by Mitchell

which was following the truck, were kept under continuous surveillance all of the time after they crossed the border at Brownsville, Texas. Meanwhile, a DEA "stake-out" unit had been established as the same Holiday Inn in San Antonio that had previously been designated as the truck's destination. The DEA agents had set up in advance a videotape surveillance unit, and a special "starlight scope" for taping by moonlight.

Mancuso parked the truck in the San Antonio Inn parking lot, seven hours and approximately 300 miles after crossing the Mexican border. When Mitchell appeared, unlocked and attempted to enter the truck, he was arrested by a DEA agent. An initial search of the truck did not turn up any contraband. Dogs were brought in, and their behavior suggested the presence of contraband. A bolt securing the bottom of the truck was removed enough to disclose a sample of what appeared to be marijuana. Subsequently, at police headquarters, 400 pounds of marijuana was removed.

The government, relying on *Chambers v. Maroney*, 1970, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, argues that the search is valid under the automobile search exception to the warrant requirement. Mitchell responds that the search cannot be justified because there were no exigent circumstances. Since this was a planned search, he contends there was adequate opportunity to obtain a warrant well in advance of the seizure of the truck.

We fully recognize the general princi-

ple of probable cause coupled with exigent circumstances urged by the government to justify its proceeding without a warrant. That there was probable cause to arrest Mitchell and to search the vehicle at the time he attempted to enter it cannot be disputed. But, the government has been unable to demonstrate any exigent circumstances. Its claim, that the evidence might evaporate, is unsubstantiated in the record. To the contrary the government had planned and prepared for the expected search at the designated site with unusually extensive personnel and equipment. There was literally no risk of loss of the contraband, nor loss of sight of the vehicle enroute as it was at all times under the control of Mancuso, the cooperating informer. The only circumstances suggesting unpredictability were the facts unknown to Mancuso. He did not know the identity of the principals involved, nor that the trip in question would not be aborted as had previously occurred. In the distinctive factual context of this case we regard these uncertainties as of minimal significance. The notion of unpredictability here is simply outweighed by the extraordinary specificity of the government's advance knowledge and planning of the search over such a prolonged time period.

Essentially, the government's contention is the existence of *per se* exigency for a warrantless search whenever an automobile is involved, regardless of the attendant circumstances. To uphold this

search under the automobile exception would entail a radical expansion of that theory's scope contrary to the underlying rationale for allowing the original deviation from the constitutional rule. *Carroll v. United States*, 1925, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543. In the absence of the compelling facts of exigency, reason for the exception fails. As the Supreme Court has reiterated, "The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified." *Coolidge v. New Hampshire*, 1971, 403 U.S. 443, 463 n. 20, 91 S.Ct. 2022, 2036, 29 L.Ed.2d 564. *See* also *Cardwell v. Lewis*, 1974, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325.

[1] In *Chambers*, a warrantless search of a car securely held in government custody was nevertheless reasonable only because the *initial* seizure had been proper due to exigent circumstances. *Chambers, supra*, 399 U.S. at 51–52, 90 S.Ct. 1975. *See* Note, Warrantless Searches and Seizures of Automobile, 87 Harv.L.Rev. 835, 843–844 (1974); Miles and Wefing, The Automobile Search and the Fourth Amendment—A Troubled Relationship, 4 Seton Hall L.Rev. 105, 130–132 (1972). The vehicle's potential instant mobility has always been the crucial factor rendering the prior obtaining of a search warrant impractical. Thus effective law enforcement requires im-

mediate action because "the opportunity [for the] search is fleeting." *Chambers, supra* at 51, 90 S.Ct. at 1981. But there is no *per se* exemption of the warrant requirement for automobiles. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge, supra*, 403 U.S. at 461–62, 91 S.Ct. at 2035.

[2] In the instant case the exigency factor is missing. There were no time constraints. On the contrary it was entirely practicable for DEA to procure a search warrant. Probable cause to suspect contraband was present. The entire operation from beginning to end was intimately surveilled. The government knew when and where the car was to arrive, and once arrived in the motel parking lot, it was surrounded by no less than ten surveilling agents. There was no question of mobility. We deal here with a *planned* warrantless seizure, see *Coolidge, supra*, at 471 n. 27, 91 S.Ct. 2022, without any unforeseeable or actually unforeseen circumstances.

[3] The second theory advanced by the government is that there was a customs search by Customs agents having broad statutory authority to conduct border searches without either a search warrant or even probable cause. 19 U.S.C.A. § 482. *United States v. Martinez*, 5 Cir. 1973, 481 F.2d 214. Since there are no specific temporal or spatial limitations on this search authority the government submits that the search is a

reasonable exercise of its customs authority. Mitchell's response is that this was not a functional equivalent of a border search, nor was it a customs search because it was not conducted by customs agents; the agents were simply passive observers, present for the purpose of vicariously conferring their statutory search authority upon DEA.

We need not reach the issue of whether, and under what circumstances, an otherwise reasonable border search could be invalidated on the basis of the pretextual presence of customs agents in a search operation clearly run by other governmental officials. *See United States v. Thompson*, 5 Cir. 1973, 475 F.2d 1359, 1361–63. We assume that this search was carried out under the customs authority, yet even this broad authority is subject to constitutional delimitations.

The government relies on *United States v. Martinez, supra*, in which we upheld as constitutionally permissible a search 150 miles from the border (after more than 300 miles of actual driving) and 142 hours later in time. But we made it clear in *Martinez* that the proper constitutional approach to determining the validity of the search is the "reasonableness standard, which requires a full evaluation of the circumstances leading to the search as a basis for determining its propriety." We utilized this "reasonableness standard," rather than the "appealing simplicity" of the bare "factors of time and distance to the exclusion of all other factors." *Id.* at 218, 219.

In applying the *Martinez* standard to the facts of the instant case, we again emphasize that we do not adopt a *per se* formula defining the outside numerical functional equivalents of the border. That the scope of the border is "an elastic concept, not susceptible to precise definition in temporal or spatial terms," *Martinez, supra*, at 218, is simply a recognition of the infinite possibilities for varying patterns of factual circumstances.[1]

But, here the complete, detailed, and reliable knowledge of the itinerary and destination of the vehicle, the control of the vehicle by the cooperating informer, and the thorough surveillance and general preparedness of the government at the planned search site, taken together with the time and distance, destroy the underlying criteria for a proper border search. In *Martinez*, the course of the vehicle's journeying and its eventual destination were unforeseeable. All of the time that that vehicle was being driven on the highways there was a continuous possibility that the suspected contraband would be lost or destroyed. There was no such possibility in the instant case, nor was any significant aspect of the vehicle's journeys either unforeseeable or unforeseen.

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1. See for example the geographical range in cases where we have upheld customs searches conducted at distances, up to 150 miles, from the border, collected in *Martinez, supra*, at 219, n. 11. But it is significant for our analysis of the instant case that in all of those cases the destination of the vehicle was unknown.

The border search exception to the warrant requirement is grounded upon finding a pressing governmental need for acting without a warrant. The courts have consistently treated the border search exception as based on the necessity for "national self-protection" in protecting the country from smuggling of contraband. *Carroll, supra*, 267 U.S. at 154, 45 S.Ct. 280. *Thomas v. United States*, 372 F.2d 252, at 254. This rationale of a practical imperative mandating immediate action justifies the notion of an extended border search.

The national interest in apprehending smugglers and their contraband makes such a conceptual elasticity constitutionally acceptable. *Martinez, supra*, and other cases finding searches reasonable "even though conducted a considerable distance from the border," all differ from the instant case in this vital regard, *Martinez, supra*, at 219, n. 11: in those cases, the court's approval of the extended search was carefully tied to the needs of effective law enforcement presented in the specific facts. Here, the furtherance of the national interest did not require that immediate, on-the-spot action affording no opportunity for procuring a warrant. "[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles." *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266, 269, 93 S.Ct. 2535, 2537, 37 L.Ed.2d 596. *See* Note, Border Searches and the Fourth Amendment, 77 Yale L.J. 1007, 1011–14 (1968).

Reversed.

APPENDIX C

Judgment of the Court of Appeals
Upon Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 75-1814

D.C. Docket No. SA-74-CR-84

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM CHADBOURNE MITCHELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before: BROWN, Chief Judge, and GEWIN, THORNBERRY*, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.**

JUDGMENT ON REHEARING *EN BANC*

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

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* Because of illness, Judge Thornberry did not participate in the consideration of this case.

** Because of illness, Judge Wisdom did not participate in the hearing or in the consideration of this case.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 20, 1976

RONEY, Circuit Judge, concurring in result only;

DYER, Circuit Judge, with whom GOLDBERG, GODBOLD and MORGAN, Circuit Judges, join, dissenting.

Issued as Mandate:

Appendix D

District Court's Judgment of Guilt

UNITED STATES DISTRICT COURT

for the

Western District of Texas
San Antonio Division

United States of America vs.

Defendant:

William Chadbourne Mitchell

Docket No.: SA 74 CR 84

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date – February 12, 1975.

WITH COUNSEL:

Roy R. Barrera and Joel Steinberg

PLEA:

Not Guilty, at arraignment on April 29, 1974.

FINDING AND JUDGMENT:

There being a finding of Guilty, by the Court on January 14, 1975.

Defendant has been convicted as charged of the offenses of having knowingly, unlawfully and intentionally possessed with intent to distribute approximately 400 pounds of marihuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), as charged in paragraph one of Count Two of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years with a five-year special parole term.

SENTENCE OR PROBATION ORDER:

IT IS ORDERED that the defendant be released on his present appearance bond pending the appeal in this cause.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

SIGNED BY:

U.S. District Judge: Adrian A. Spears

Date: 2/12/75

Appendix E

District Court's Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

for the

Western District of Texas
San Antonio Division

United States of America vs.

Defendant:

William Chadbourne Mitchell

Docket No.: SA 74 CR 84

FINDINGS OF FACT, CONCLUSIONS OF LAW

(Filed: January 26, 1975)

This cause having been submitted to the Court on the stipulation of the Parties hereto, testimony of various witnesses, and exhibits admitted in evidence on behalf of the Parties hereto, and the Court having fully considered the evidence as presented, and the arguments of counsel, does now make the following:

FINDINGS OF FACT

1. On October 20, 1973, William Chadbourne Mitchell rented a vehicle from National Car Rentals in Brownsville, Texas, (hereinafter referred to as "vehicle".) under the name of Robin J. Kitchener, the said William Chadbourne Mitchell identifying himself as Robin J. Kitchener to the official of National Car Rentals, Brownsville, Texas.

2. On October 21, 1973, at approximately 10:30 A.M., the "vehicle" was observed parked next to a 1970 model Chevrolet

pick-up truck with an over the cab camper (hereinafter referred to as "pick-up") at the Holiday Inn in Matamoros, Republic of Mexico.

3. On October 21, 1973, John Joseph Mancuso drove the "pick-up" from Matamoros, Republic of Mexico, through Brownsville, Texas, to a parking lot of the Holiday Inn Northeast, San Antonio, Texas, where he locked the said "vehicle" and departed the premises.

4. On October 21, 1973, William Chadbourne Mitchell drove the "vehicle" from Matamoros, Republic of Mexico, through Brownsville, Texas, to the parking lot of the Holiday Inn Northeast, San Antonio, Texas, where he observed the "pick-up" during daylight hours.

5. On October 21, 1973, at the Holiday Inn Northeast, San Antonio, Texas, at or about sundown or dusk, William Chadbourne Mitchell removed a key from his person and after looking both right and left unlocked the "pick-up", underneath the camper of which was stored approximately 400 pounds of marihuana, a Schedule I Controlled Substance.

6. On October 21, 1973, William Chadbourne Mitchell at the Holiday Inn Northeast, San Antonio, Texas, removed two "L" frames and two "jacks" from the "vehicle" and stored said items in the "pick-up".

7. On October 21, 1973, at the time of his arrest at the Holiday Inn Northeast, San Antonio, Texas, William Chadbourne Mitchell had in his possession a driver's license, library card, Mexico Tourist visa, birth certificate and an authorization for temporary importation of vehicle in the name of Robin J. Kitchener, the latter being the same name by which John Joseph Mancuso had been given permission to drive the "pick-up".

8. In the latter part of April, 1973, John Joseph Mancuso had driven the "pick-up" from the Republic of Mexico to San Antonio, Texas, said service having been provided by John Joseph Mancuso under an authorization signed in the name of Robin J. Kitchener and for Green Transportation Company.

9. In the early part of May, 1973, after having been contacted by officials of Green Transportation Company, John Joseph Mancuso, in accordance with the instructions from officials of Green Transportation Company, went to a bar at 114th Street and Broadway, New York, New York, where he received $5,000 in cash.

10. 400 pounds of marihuana is a commercial quantity and any possession thereof would be for the purpose of distribution.

CONCLUSIONS OF LAW

The Defendant William Chadbourne Mitchell is guilty as charged in Count II of the indictment in the above styled and numbered cause.

DATED this 26th day of January, 1975.

s/ Adrian A. Spears

ADRIAN A. SPEARS, Chief Judge
United States District Court
Western District of Texas